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Serial No. 09/683,761**

Atty. Docket No. Erie - 20243

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of : Patent Application
Robert J. Smith : Group art unit: 3727
Serial No. 09/683,761 : Examiner: Ngo, Lien M
Filed 02/11/2002 : Confirmation No. 5580

APPEAL BRIEF

Mail Stop After Final
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450
Sir:

Applicant hereby appeals to the Board of Patent Appeals and Interferences from the decision dated October 6, 2003 of the Primary Examiner finally rejecting claims 1-20. This is in support of the notice of appeal filed January 5, 2004 appealing the final rejection of claims 1-20.

I**REAL PARTY IN INTEREST**

Erie Plastics Corporation is the owner of the entire right title and interest in the above identified patent application as the assignee of record in the assignment recorded on Reel 012383 frame 0442 and is the real party in interest of this application at the time this brief is being filed.

II**RELATED APPEALS AND INTERFERENCES**

There are no other appeals or interferences known to appellant, the assignee or the appellant's legal representative that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal. This statement is not limited to co-pending patent applications.

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III

STATUS OF CLAIMS

Claims 1-20 remain pending in the application.

Claims 1-20 are rejected under 35 U.S.C. § 103 (a) as being obvious in view of the combined teachings of U.S. Patent No. 5,975,369 to Yurkewicz et al. (hereinafter the "Sports Container Closure Patent") and U.S. Patent No. 5,992,692 to Boissay (hereinafter the Dispensing Bottle Patent").

IV

STATUS OF AMENDMENTS

There have been no amendments filed after the final rejection of October 6, 2003. The claims stand as amended in the amendment dated July 23, 2003 and a clean copy of the appealed claims as they now stand is found in the appendix.

V

SUMMARY OF INVENTION

The following is a concise explanation of the invention defined in the claims involved in the appeal and refers to the specification (by page and line number) and to the drawings (by reference characters) as required by 37 C.F.R. § 1.192(c) (5).

The present claimed invention relates to a dust cover 16, specifically a push pull type container closure 10 incorporating the dust cover 16. The push pull closure 10 includes three critical components, namely a shell 12 attachable to a container, a tip 14 moveable on the shell 12 and a dust cover 16 attached to the shell 12. See paragraph 9 of the specification and all of the figures.

The shell 12 has a body attachable to a container around a container opening thereof. The shell 12 has a shell opening 20 in fluid communication with the container opening when the shell 12 is attached to the container. The shell 12 includes a central stem 18 with the shell opening 20 formed as an annular opening surrounding the central stem 18. An annular wall 22 extends from

the body of the shell 12 and surrounds the annular opening 20 with the stem 18 attached to the annular wall 22. See paragraphs 10-14 of the specification and all of the figures.

The tip 14 is received on the shell 12 and is slidably movable between an open and closed position, with the closed position sealing the shell opening 20. See paragraph 15 of the specification and all of the figures.

The shell 12 and the tip 14 are as described in the Sports Container Closure Patent as mentioned in paragraph 9 of the specification. It is the object of the present invention to improve upon the dust cover disclosed in the Sports Container Closure Patent, and other push pull type closures, to minimize leakage issues while maintaining all of the benefits of a push pull type closure, such as the closure in the Sports Container Closure Patent. See paragraph 3 of the specification.

The dust cover 16 is releasably attached to the shell 12 and is designed in the present invention to avoid the leakage problems associated with the prior art push pull closures. The dust cover 16 includes internally extending ribs 70 that engage with the tip 14 when the dust cover 16 is attached to the shell 12. The ribs 70 are radially positioned around an interior of the dust cover 16. The ribs 70 maintain proper alignment between the dust cover 16, the tip 14 and the shell 12 when the dust cover 16 is attached to the shell 12 preventing the closure 10 from leaking in the closed position as discussed in paragraph 18 of the specification.

There are other features of the closure 10 of the present invention. For example, the shell 12 has a cover-attaching member 60, formed by a groove, positioned on the stem 18 and engaging the dust cover 16 to releasably attach the dust cover 16 to the shell 12. Additionally the dust cover 16 includes a tamper-evident band 62 (see paragraph 17) removably attached to the dust cover 16. The dust cover 16 includes a top 56, a cylindrical side wall 58 extending from the top 56, with the tamper-evident band 62 formed by a lower portion of the cylindrical side wall 58 and at least one projection 68 extending radially inwardly of the side wall 58 (see paragraphs 16-17). Further each rib 70 is attached to the top 56, and each rib 70 has a curved inner face and a beveled lower edge, and each rib 70 extends from a position on the top 56 adjacent the shell engaging member 60.

VI **ISSUES**

A concise statement of the issues presented for review is as follows.

Are Claims 1-20 un-patentable under 35 U.S.C. § 103 (a) as being obvious in view of the combined teachings of the Sports Container Closure Patent and the Dispensing Bottle patent.

VII **GROUPING OF CLAIMS**

It is noted that for each ground of rejection which appellant contests and which applies to a group two or more claims, the Board shall select a single claim from the group and shall decide the appeal as to the ground of rejection on the basis of that claim alone, unless a statement is included that the claims of the group do not stand or fall together and, in the argument section of the brief support for the grouping identified is presented.

Claims 1, 5, 6, 7 and 13 stand or fall together. Claims 2, 3, 4 and 16 stand or fall together. Claims 8 and 9 stand or fall together. Claims 18, 19 and 20 stand or fall together. Claims 10, 11, 12, 14 and 15 are grouped separately and stand or fall independently. The support for these groupings are found in the argument section below.

VIII **ARGUMENT**

(i) 35 U.S.C. § 112, first paragraph

None

(ii) 35 U.S.C. § 112, second paragraph

None

(iii) 35 U.S.C. § 102

None

(iv) 35 U.S.C. § 103

As discussed above, claims 1-20 have been rejected under the combined teachings of the Sports Container Closure Patent and the Dispensing Bottle patent. The examiner acknowledges that the Sports Container Closure Patent does not teach or suggest a dust cover with radially extending ribs engagable with the tip when the dust cover is attached to the shell.

The examiner then asserts that the Dispensing Bottle patent teaches "in fig. 1, a container closure comprising a cover 16 having internal and radially extending ribs 56 engagable with a tip 32 when the cover [16] is attached to a shell 14." The examiner then concludes that "it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the [Sports Container Closure Patent] cover having extending ribs, *as claimed*, as taught by [the Dispensing Bottle Patent], in order to provide a guiding structure for proper alignment of the cover at the tip during closing of the cover" [Emphasis added].

The applicants arguments against this combination set forth on pages 8-9 of the amendment of July 23, 2003 are incorporated herein by reference.

ANALAGOUS ART

The first objection to the examiner's suggested combination is that the applied references are non analogous to each other. The examiner notes that analogous art must be in the field of the applicant's endeavor or reasonably pertinent to the particular problem to which the applicant was concerned. The present claimed invention is in the field of push-pull closures (such as disclosed in the Sports Container Closure Patent). Further the particular problem to which the applicant of the present application was concerned was minimizing the leaking of push pull type

closures.

The Bottle Dispensing Patent fails to satisfy either test for analogousness. The Bottle Dispensing Patent “relates to a bottle of the type comprising a hollow body intended to contain a product...” (See column 1 lines 4-5). The purpose of the Bottle Dispensing Patent “is to provide a bottle that makes it possible to reliably tear the membrane with only a small movement of the means for tearing” (See column 1 lines 25-27). The Bottle Dispensing Patent further clarifies that the “subject of the invention is therefore a bottle of the aforementioned type” (See column 1 lines 28-29).

The Bottle Dispensing Patent does disclose a closure, namely cap 16, however this closure is not similar to a push pull type closure of the present invention. The examiner references element 12 as a “shell”, however the specification of the Bottle Dispensing Patent clearly describes the element 12 as the body 12 of the bottle 10. The shell of a push pull type closure is attached to the neck finish (generally through matching threads) of a bottle or other container. The element 14 which the examiner asserts is a “tip” is actually a dispensing end piece 14 for the bottle 10. The end piece 14 is more similar to the shell of a push pull type closure than a tip thereof, in that, when attached to a container (such as bottle 10) it forms the dispensing opening in communication with the opening of the bottle through which the contents of the bottle can be dispensed. The cover or cap 16 of the Bottle Dispensing Patent is the closure for the bottle with a projection 58 thereon forming the sealing mechanism.

There is no reason, other than looking at the applicants claimed invention, why one of ordinary skill in the art at the time the invention was made when addressing improvements to push pull closures one would look to the teachings of the Bottle Dispensing Patent. It is not in the same field as the applicant’s endeavor, nor is it reasonable pertinent to the problems being addressed, nor does it operate in any similar fashion to the push pull type closures of the present

invention.

TEACHING AWAY

As noted above purpose of the Bottle Dispensing Patent “is to provide a bottle that makes it possible to reliably tear the membrane with only a small movement of the means for tearing” (See column 1 lines 25-27). The modification suggested by the examiner does not “provide a bottle [or a closure] that makes it possible to reliably tear the membrane with only a small movement of the means for tearing”. Further the ribs 56 of the closure cap 16 have the stated purpose of causing the end piece 14 “to move from it’s standby position ... into its active position” (See column 4 lines 45-50). The examiner’s suggested modification does not utilize the ribs to move a structure to an active position. The fair reading of the references, taken in their entirety, teach away from the examiner’s suggested combination.

MOTIVATION TO COMBINE

The examiner asserts “it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the [Sports Container Closure Patent] cover having extending ribs, *as claimed*, as taught by [the Dispensing Bottle Patent], in order to provide a guiding structure for proper alignment of the cover at the tip during closing of the cover” [Emphasis added]. The examiner’s own statements clearly evidence he is improperly relying upon the applicant’s own disclosure. The examiner is clearly using the invention “as claimed” as a blueprint to sift through the maze of prior art teaching arbitrarily selecting bits and pieces of the prior art in attempt to reconstruct the claimed device. It is what the two references would teach to one of ordinary skill in the art, when considering the references as a whole, **WITHOUT** referencing the applicants own disclosure, that defines obviousness.

The examiner attempts to take the ribs from a closure member of the Dispensing Bottle Patent and place them on a dust cover of a push pull closure in the Sports Container Closure Patent "in order to provide a guiding structure for proper alignment of the cover at the tip during closing of the cover". The ribs of the closure cap 16 were not identified as providing any such guiding structure.

The ribs in the Dispensing Beverage Patent are used to move the dispensing end into an active position, but they lose any similar function in the examiner's suggested modification. The ribs in the Dispensing Beverage Patent are on a sealing member that closes a dispensing opening, but they are placed on a distinctly different member (a non sealing dust cover) in the proposed modification. The objects and advantages of the Dispensing Beverage Patent are not found in the proposed modified device. There is simply no motivation to combine the references in the manner suggested by the examiner, other than that found in the applicant's own disclosure.

The above arguments are applicable to all of the claims in any of the cited groupings and need not be repeated. The above arguments are effectively the only applicable arguments for the grouping of claims 8-9. The remaining groups will be addressed below.

CLAIMS 1, 5-7 and 13

Independent claim 1 differs from claim 8 in that claim 8 is directed to a dust cover for a push pull type closure. Independent claim 1 is directed to the entire push pull closure assembly. Claim 1 explicitly recites the shell that is attachable to the container, and the tip moveable between an open and closed position on the shell in addition to the dust cover. The combined references are not believed to teach or suggest a dust cover for a push pull closure for the reasons discussed above, and they are believed to further teach away from the entire push pull closure as defined in claim 1. Claims 5-7 and 13 depend directly or indirectly from claim 1 and stand or fall

with claim 1.

CLAIMS 2-4 and 16

Claims 2-4 and 16 depend directly or indirectly from claim 1 and are therefore allowable for all the reasons discussed above in connection with claim 1. These claims further define either the cover attaching member on the top of the dust cover or on the stem of the shell. This structure is in contrast with the dispensing end piece 14 and sealing projection 58 in the Bottle Dispensing Patent. If the examiner is relying upon the cover cap 16 of the Bottle Dispensing Patent to modify the Sports Container Closure Patent, it would seem that the sealing structure 58 of this cap would also be utilized in the modified device. The examiner's position that it would be obvious to take the ribs 56, but leave the projection 58, of the Bottle Dispensing Patent further evidences the arbitrary nature of the suggested combination. These claims are believed to further distinguish the invention from the combined teachings of the applied prior art.

CLAIM 10

Claim 10 depends from claim 8 and is allowable for all of the reasons discussed above in connection with claims 8 and 9. Claim 10 further defines that the ribs have "a curved inner face". As shown in the figures, the curved inner face of the ribs 70 of the present invention conform to the outer shape of the tip 14. The ribs 56 of the closure cap 16 of the Bottle Dispensing Patent have no such curved face since they are only intended as pushing elements for moving the end piece 14. Claim 10 is believed to further distinguish the present claimed invention from the reasonable combination of the applied prior art.

CLAIM 11

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Claim 11 depends from claim 10 and is allowable for all of the reasons discussed above in connection with claim 10. Claim 11 defines that the ribs have “a curved inner face” (claim 10) together with “a beveled lower edge”. As shown in the figures the curved inner face of the ribs 70 of the present invention conform to the outer shape of the tip 14. The ribs 56 of the closure cap 16 of the Bottle Dispensing Patent have no such curved face since they are only intended as pushing elements for moving the end piece 14. The beveled edge of the ribs 70 will act to provide initial alignment of the dust cover 16. There is no similar structure in the ribs 56 of the Bottle Dispensing Patent. Claim 11 is believed to further distinguish the present claimed invention from the reasonable combination of the applied prior art.

CLAIM 12

Claim 12 depends from claim 8 and is allowable for all of the reasons discussed above in connection with claims 8 and 9. Claim 12 further defines that the ribs “extend from a position on said top adjacent said shell engaging member”. The ribs 56 of the closure cap 16 of the Bottle Dispensing Patent extend adjacent a sealing member (projection 58) as discussed above in connection with claim 2. Claim 12 is believed to further distinguish the present invention from the reasonable combination of the prior art. Claim 12 stands separately from claim 2 above since claim 2 recites (in claim 1) the shell and the tip members explicitly.

CLAIM 14

Claim 14 depends from claim 1 and is allowable for all of the reasons discussed above in connection with claim 1. Claim 14 further defines that the ribs have “a curved inner face”. As shown in the figures the curved inner face of the ribs 70 of the present invention conform to the outer shape of the tip 14. The ribs 56 of the closure cap 16 of the Bottle Dispensing Patent have

no such curved face since they are only intended as pushing elements for moving the end piece 14. Claim 14 is believed to further distinguish the present claimed invention from the reasonable combination of the applied prior art.

CLAIM 15

Claim 15 depends from claim 14 and is allowable for all of the reasons discussed above in connection with claim 14. Claim 15 defines that the ribs have "a curved inner face" (claim 14) together with "a beveled lower edge". As shown in the figures the curved inner face of the ribs 70 of the present invention conform to the outer shape of the tip 14. The ribs 56 of the closure cap 16 of the Bottle Dispensing Patent have no such curved face since they are only intended as pushing elements for moving the end piece 14. The beveled edge of the ribs 70 will act to provide initial alignment of the dust cover 16. There is no similar structure in the ribs 56 of the Bottle Dispensing Patent. Claim 15 is believed to further distinguish the present claimed invention from the reasonable combination of the applied prior art.

CLAIM 17

Independent claim 17 is similar to claim 1 discussed above and is allowable for all of the reasons discussed above in connection with claim 1. Claim 17 further explicitly recites the functional language that the ribs on the dust cover are structurally positioned to prevent the closure from leaking in the closed position. Even if the pushing ribs 56 of the Bottle Dispensing Patent were added to the Sports Container Closure Patent, there is no teaching or suggestion to provided this tight fitting leak preventing arrangement of the elements. Claim 17 is believed to further distinguish the present claimed invention from the applied prior art.

CLAIMS 18-20

Claims 18-20 depend directly or indirectly from claim 17 and are allowable for all of the reasons discussed above in connection with claim 17. The claims further define the cover attaching member similar to claims 2-4 and 16 above and are further allowable for the reasons discussed above in connection with claim 2.

(v) Other rejections

None

VIIICONCLUSION

Claims 1-20 satisfy the requirements of 35 U.S.C. § 103 and reversal of the examiners rejection is respectfully requested.

Respectfully submitted,

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Appendix

1. A container closure comprising:

a shell having a body attachable to a container around a container opening thereof, said shell having a shell opening in fluid communication with the container opening when said shell is attached to the container, wherein said shell includes a central stem, said shell opening is an annular opening surrounding said stem, an annular wall extending from said body and surrounding said annular opening, said stem attached to said annular wall;

a tip received on said shell movable between an open position and a closed position sealing said shell opening; and

a cover releasably attached to said shell, said cover including internally extending ribs engagable with said tip when said cover is attached to said shell.

2. The container closure of claim 1 wherein said shell further includes a cover-attaching member positioned on said stem, wherein said cover attaching member of said shell engages said cover to releasably attach said cover to said shell.

3. The container closure of claim 2 wherein said cover-attaching member is formed by a groove on said stem, said groove engaging said cover to releasably attach said cover to said shell.

4. The container closure of claim 3 wherein said ribs are radially positioned around an interior of said cover.

5. The container closure of claim 1 wherein said ribs are radially positioned around an interior of said cover.

6. The container closure of claim 1 wherein said cover includes a tamper-evident band removably attached to said cover.

7. The container closure of claim 6 wherein said cover further includes a top, a cylindrical side wall extending from said top, wherein said tamper-evident band is formed by a lower portion of said cylindrical side wall and at least one projection extending radially inwardly of said side wall.

8. A dust cover for a container closure having a shell attachable to a container around a container opening thereof and a tip received on said shell movable between a closed positioned sealing said shell opening and an open position, said dust cover comprising:

a top,
a cylindrical side wall extending from said top,
a shell engaging member for releasably attaching said cover to the shell, and
a plurality of tip engaging ribs extending inwardly from said sidewalls for engaging with the tip when said cover is attached to the shell.

9. The dust cover of claim 8 wherein each said rib is attached to said top.
10. The dust cover of claim 8 wherein each said rib has a curved inner face.
11. The dust cover of claim 10 wherein each said rib has a beveled lower edge.
12. The dust cover of claim 8 wherein each said rib extends from a position on said top adjacent said shell engaging member.
13. The container closure of claim 1 wherein each said rib is attached to a top of said cover.
14. The container closure of claim 1 wherein each said rib has a curved inner face.
15. The container closure of claim 14 wherein each said rib has a beveled lower edge.
16. The container closure of claim 1 wherein each said rib extends from a position on a top of said cover which is adjacent a cover-attaching member.

17. A container closure comprising:

a shell having a body attachable to a container around a container opening thereof, said shell having a shell opening in fluid communication with the container opening when said shell is attached to the container, wherein said shell includes a central stem, said shell opening is an annular opening surrounding said stem, an annular wall extending from said body and surrounding said annular opening, said stem attached to said annular wall;

a tip received on said shell movable between an open position and a closed position sealing said shell opening; and

a cover having a cover attaching member for releasably attaching said cover to said shell, said cover including internally extending ribs engagable with said tip when said cover is attached to said shell, whereby said ribs maintain proper alignment between said cover, said tip and said shell when said cover is attached to said shell preventing said closure from leaking in the closed

position.

18. The container closure of claim 17 wherein said cover attaching member is formed by a groove on said stem, said groove engaging said cover to releasably attach said cover to said shell.

19. The container closure of claim 18 wherein said ribs are radially positioned around an interior of said cover.

20. The container closure of claim 19 wherein said cover includes a tamper-evident band removably attached to said cover.